No. 90-516

In the

Supreme Court of the United States

October Term, 1990

JILL S. KAMEN,

Petitioner,

v.

KEMPER FINANCIAL SERVICES, INC., and CASH EQUIVALENT FUND, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

ABOLITION OF THE FUTILITY EXCEPTION IS NOT ACADEMIC

Respondent KFS contends that the decision of the Court of Appeals abolishing the futility exception to the demand requirement is purely academic. The District Court held that the allegations of the complaint were insufficient to support the allegation of futility, and, according to KFS (Resp. Br., p. 6), "The Court of Appeals did not question the correctness of that factual finding." KFS myopically reads the complaint as asserting merely that the directors received remuneration for their services and that they approved the challenged conduct. (*Id.*). KFS

is incorrect, both in its reading of the complaint and in its analysis of the appellate opinion.

The complaint sets forth in considerable detail the facts underlying the allegation of futility. (92a-93a). Those facts will not be repeated here; they go well beyond mere compensation and acquiescence.

Far from accepting the finding of the District Court, the Court of Appeals, discussing the allegations of the complaint herein, implicitly found futility. It held (17a):

> . . . cases, such as our opinions in *Nussbacher* and *Thornton*, accept the board's actual or anticipated unwillingness to sue as futility adequate to excuse demand . . .

Indeed, the Court found it necessary to overrule its decision in *Nussbacher* in order to reach the result it described in no uncertain terms: abolition of the futility exception. (21a).

II

PETITIONER HAS A CONSTITUTIONAL RIGHT TO A JURY TRIAL

In *Local No. 391 v. Terry*, 110 S.Ct. 1339 (1990), this Court twice stated that the remedy sought is the more important criterion of the right to a jury trial; 110 S.Ct. at 1345 and 1348 n.8. Here petitioner seeks the legal remedy of damages. Yet respondent contends that the remedy sought is "essentially an action for restitution, which is an equitable remedy." (Resp. Br., pp. 14-15). Presumably that is because respondent measures damages by the amount of fees it received. (*Id.*, p. 2).

Damages and restitution are, of course, different remedies. Damages are designed to make good for the plaintiff's loss. Restitution is designed to take away the defendant's unjust gain. The defendant's gain may be more than the plaintiff's loss, or it may be less, or it may happen to be the same. Whichever it is, a plaintiff seeking damages must prove her loss. If she does, she recovers damages, and it makes not one whit of difference to the damage claim whether or not the defendant has made a gain or how much it has gained. In the words of 4 *Restatement, Torts 2d*, § 903, Comment (b), p. 454 (1979):

> In cases in which a tortfeasor has received from the commission of a tort against another person a benefit that constitutes unjust enrichment at the expense of the other, he is ordinarily liable to the other, at the latter's election, either for the damage done to the other's interests or for the value of the benefit received through the commission of the tort.

In short, no matter what profit, if any, the defendant may have reaped from the wrong, the damage claim remains a damage claim and is not converted into a claim for restitution.

The victim of a theft or other tort is not deprived of her damage claim at law because her loss is equivalent to the enrichment of the thief. *U.S. v. Bitter Root Development Co.*, 200 U.S. 451, 471-72 (1906); *Bruce v. Bohanon*, 436 F.2d 733, 736 (10th Cir. 1970), *cert. denied*, 403 U.S. 918 (1971); *Robine v. Ryan*, 310 F.2d 797, 798-99 (2d Cir. 1962). In each of these cases the unjust enrichment of the wrongdoing defendants was equivalent to the loss of the plaintiffs, but the actions were held to be for damages and hence to be at law, with the attendant right of jury trial. By the same

token, a damage action under Section 36(b) is at law and triable by jury, regardless of the amount of the adviser's profits.

Even if the action be characterized as restitutionary, that would not deprive petitioner of her jury right. By the seventeenth century, the remedy of restitution was available both at common law and in equity. Although this form of relief was initially only available in equity, the common law judges eventually became jealous of the expanding power of the Court of Chancery. Conscious that the common law's inflexible and formalistic requirements in both pleading and proof afforded no remedy in many meritorious cases, these judges created the action of *indebitatus assumpsit* (also known as one of the "common counts" or an action for money had and received). *Stone v. White*, 301 U.S. 532, 534 (1937); *J.W. Carter Music Co. v. Bass*, 20 F.2d 390, 393 (S.D. Tex. 1927); *Restatement of Restitution*, Introductory Note, pp. 4-10 (1937); Prosser, *Handbook of the Law of Torts* (4th Ed.), § 94 at 627-31 (1971); Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 Yale L.J. 655, 658-59 (1963).

It has been widely recognized that an action for money had and received is legal in form and is considered an action at law, although governed by equitable principles. *Gaines v. Miller*, 111 U.S. 395, 397-98 (1884); *Herrman v. Gleason*, 126 F.2d 936, 939-40 (6th Cir. 1942) ("This action, while legal in form, is equitable to the core"); *J.W. Carter Music Co. v. Bass, supra*, 20 F.2d at 393 ("Though an action at law, it is equitable in its nature, and is said to resemble a bill in equity, and to lie whenever a bill in equity would lie"); *Roberts v. Ely*, 113 N.Y. 128 (1889); *Byxbie v. Wood*, 24 N.Y. 607, 610-611 (1862);

Steinert v. Title Guarantee & Trust Co., 258 App. Div. 927, 16 N.Y.S.2d 749, 750 (2d Dept. 1939), *aff'd* 283 N.Y. 636 (1940); 58 C.J.S., *Money Received*, § 1 at 906-07 (1948).

Because an action for money had and received, though governed by equitable principles, is universally recognized to be one at law, a jury trial has been historically available. Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 53, 57 (1888) (" . . . the right to a trial by jury was the principal reason for a creditor's preference for *Indebitatus Assumpsit*. . . . "); 3 Blackstone Commentaries at 157-58; 58 C.J.S., *Money Received*, § 32 at 946. For examples of assumpsit cases for money had and received which were tried to a jury, *see Nash v. Towne*, 72 U.S. 689, 704 (1867); *Downey v. Hicks*, 14 How. 240, 246 (1852); *Brooks v. People's Bank*, 233 N.Y. 87, 93-94 (1922).

The fact that this action seeks recovery from a fiduciary does not change the case from one at law to one in equity. The courts have long recognized that an action for money had and received is an effective remedy for breaches of fiduciary duty. The general proposition was well stated over a century ago in *Roberts v. Ely, supra*, 113 N.Y. at 131-32:

> . . . the case falls within the familiar doctrine that money in the hands of one person, to which another is equitably entitled, may be recovered in a common-law action by the equitable owner upon an implied promise arising from the duty of the person in possession to account for and pay over the same to the person beneficially entitled. The action for money had and received to the use of another is the form in which Courts of common law enforce the equitable obligation. The scope of this remedy has been gradually

extended to embrace many cases which were originally cognizable only in courts of equity.

* * *

Nor is this form of action excluded, because in a general sense there is a relation of trust between the parties arising out of the transaction. . . . the fact that money in the hands of one person is impressed with a trust in favor of another, or that the relation between them has a trust character, does not, *ispo facto*, exclude the jurisdiction of courts of law. The general rule that trusts are cognizable in equity and are enforceable only in an equitable action, is subject to many exceptions, "as, for instance, cases of bailments, and that larger class of cases where the action for money had and received for another's use is maintained *ex aequo et bono*." (Story's Eq. Jur. § 60; COMSTOCK, J., *Lawrence v. Fox*, 20 N.Y. 278.)

Corporate fiduciaries – directors and officers – are no exception to this principle. In *Gottfried v. Gottfried*, 269 App. Div. 413, 56 N.Y.S.2d 50, 59-60 (1st Dept. 1945), a derivative suit to recover, *inter alia*, monies wrongfully received by defendant-directors, the Court reviewed the cases and declared:

> [T]he holdings are clear . . . that as to a corporate fiduciary who appropriates and as to all who receive the use or benefit of such corporate money, the gist of the action is for money had and received . . . .

Accord, *Myer v. Myer*, 271 App. Div. 465, 66 N.Y.S.2d 83, 93 (1st Dept. 1946), *aff'd*, 296 NY. 979 (1947).

Damage actions for misconduct of fiduciaries are universally held to be actions at law and, therefore, triable

by jury. *Ross v. Bernhard*, 396 U.S. 531, 542 (1970) (corporation's damage claim against directors for negligent breach of fiduciary duty); *Bruce v. Bohanon*, 436 F.2d 733, 736 (10th Cir. 1970), *cert. denied*, 403 U.S. 918 (1971) (damage claim for misappropriation of trade information entrusted to defendants on confidential basis). *Accord*, *National Union Elec. Corp. v. Wilson*, 434 F.2d 986, 988 (6th Cir. 1970) (corporation's damage claim against former officers and employees for breach of fiduciary duty); *Halladay v. Verschoor*, 381 F.2d 100, 109 (8th Cir. 1967) (damage claim against defendant who participated in wrongful transactions of testamentary trustee); *DePinto v. Provident Security Life Ins. Co.*, 323 F.2d 826, 836-7 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964) (corporation's damage claim against directors for breach of fidcuiary duty); *Robine v. Ryan*, 310 F.2d 797, 798 (2d Cir. 1962) (damage claim for defendant's wrongful appropriation of plaintiff's invention in breach of confidential relationship); *Kelly v. Dolan*, 233 F.635, 637 (3d Cir. 1916) (damage claim against corporate directors for breach of fiduciary duty).

Respondent does not contest that petitioner is entitled to a jury trial on her Section 20 claim. She is also entitled to a jury trial on her Section 36(b) claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
November 1, 1990

Respectfully submitted,

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